

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

-----x  
:  
UNITED STATES OF AMERICA, : Criminal Action No.  
:  
versus : 1:17-CR-154  
:  
KEVIN PATRICK MALLORY, :  
:  
Defendant. : May 17, 2019  
-----x

The above-entitled Sentencing was heard by the  
Honorable T.S. Ellis, III, United States District Judge.

A P P E A R A N C E S

FOR THE GOVERNMENT: JOHN T. GIBBS, AUSA  
JENNIFER K. GELLIE, AUSA  
US Attorney's Office  
2100 Jamieson Avenue  
Alexandria, VA 22314

FOR THE DEFENDANT: GEREMY C. KAMENS, ESQ.  
TODD RICHMAN, ESQ.  
1650 King St  
Suite 500  
Alexandria, VA 22314

ALSO PRESENT: Steven Green, FBI Case Agent

OFFICIAL COURT REPORTER: MS. TONIA M. HARRIS, RPR  
United States District Court  
Eastern District of Virginia  
401 Courthouse Square, Ninth Floor  
Alexandria, VA 22314

P R O C E E D I N G S

(Court proceedings commenced at 1:01 p.m.)

THE COURT: All right. Good afternoon. You may call the next matter, please.

THE DEPUTY CLERK: The Court calls criminal case United States of America versus Kevin Patrick Mallory. Case number 2017-CR-154.

May I have appearances, please. First for the Government.

MR. GIBBS: Good afternoon, Your Honor. John Gibbs and Jennifer Gellie on behalf of the United States. And I also have Special Agent Steve Green of the FBI at counsel table.

THE COURT: All right. Good afternoon to all of you.

Mr. Kamens.

MR. KAMENS: Good afternoon, Your Honor. Jeremy Kamens on behalf of Mr. Mallory. With me is Todd Richman from our office.

THE COURT: All right. Good afternoon to you and to Mr. Mallory.

All right. Mr. Kamens, I understand you anticipate wanting to offer some material that may be classified. When we come to that point, if you wish to do so, advise me, and I will take steps to close the courtroom and we'll proceed.

1           As I anticipate this will go, I don't see that  
2           happening. But if it does, because I haven't correctly seen  
3           the future as clearly as you do, call that to my attention and  
4           we'll take the appropriate steps.

5           MR. KAMENS: I'm happy to do that whenever the Court  
6           would like. My intention was to discuss the value of  
7           information that was disclosed in documents that were  
8           disclosed. And so, the specific words used in those  
9           documents, as I understand it, remain classified and in order  
10          to discuss those words, and the nature of their importance, I  
11          had asked to have that portion of the proceeding closed.

12          THE COURT: All right. If that happens, we'll cross  
13          that bridge when we come to it. It may not.

14          MR. KAMENS: Understood.

15          THE COURT: I'm going to conduct this, as I do any  
16          sentencing hearing, we'll begin at the beginning, which we did  
17          not do before, because I want to be sure that we cover all of  
18          the issues.

19          I think the last time we convened I continued the  
20          matter until now. I think Ms. Gellie you were not present for  
21          the previous one. Is that right or am I wrong?

22          MS. GELLIE: I was here, Your Honor.

23          THE COURT: Oh, I was going to welcome you back,  
24          because I thought you'd been gone for some period of time.

25          MS. GELLIE: Thank you, Your Honor.

1 THE COURT: All right. The matter is before the  
2 Court for sentencing.

3 This defendant, having been found guilty by a jury  
4 of two offenses, first, engaging in a conspiracy to gather or  
5 deliver defense -- national defense information to aid a  
6 foreign government in violation of the 794(c) of Title 18.

7 And a second conviction under Count IV of the  
8 indictment, material false statements in violation of 18  
9 U.S.C. Section 100(a)(2).

10 Now, let me inquire, first of all, Mr. Kamens,  
11 whether you had an adequate opportunity to review the  
12 presentence report, as most recently amended in April, with  
13 your client?

14 MR. KAMENS: We have, Your Honor.

15 THE COURT: Mr. Mallory, let me inquire of you  
16 whether you've had an adequate opportunity to review the  
17 presentence report as amended in April, and to review that  
18 with your counsel, Mr. Kamens and Mr. Richman?

19 THE DEFENDANT: Your Honor, I've reviewed that.

20 THE COURT: And let me confirm that you are fully  
21 satisfied with the advice and counsel you have received from  
22 Mr. Kamens and Mr. Richman?

23 THE DEFENDANT: Yes, I am.

24 THE COURT: Thank you. You may be seated.

25 Now , I believe, Mr. Kamens, there were objections

1 to paragraph 39 and 40.

2 MR. KAMENS: That's correct, Your Honor.

3 THE COURT: And what other objections were there?

4 MR. KAMENS: We objected to the two-level  
5 enhancement for abuse of position of public trust.

6 THE COURT: Any others?

7 MR. KAMENS: We asked for a downward departure.

8 THE COURT: No, that's not -- objection to the  
9 calculation of the presentence report.

10 MR. KAMENS: Nothing else, Your Honor.

11 THE COURT: All right. Those are three.

12 Mr. Gibbs, does the Government have any objections  
13 or correction to the presentence report?

14 MR. GIBBS: No, Your Honor.

15 THE COURT: All right. The Court will adopt the  
16 findings and conclusions of the presentence report as the  
17 Court's findings in the sentencing hearing with the exception  
18 of the outstanding objections on which I have yet to rule.

19 Now, let's begin with paragraphs 39 and 40. With 39  
20 and 40, as I recall the parties' objections, because they had  
21 previously been asserted, they have been exhaustively briefed,  
22 including a declaration that I received yesterday or maybe it  
23 was today. Which was it, Mr. Kamens?

24 MR. KAMENS: Your Honor, I believe we submitted a  
25 declaration this past week ago Friday. I think the Government

1 submitted a response on Wednesday of this week. We haven't  
2 submitted anything this week.

3 THE COURT: Yes, on the 10th of May, that's right,  
4 you submitted a declaration of Brian Moran.

5 MR. KAMENS: That's correct, Your Honor.

6 THE COURT: And did you respond to that?

7 MR. GIBBS: We did, Judge, that was on Wednesday of  
8 this week.

9 THE COURT: Yes. So the matter has been very  
10 exhaustively argued and briefed. The focus of the  
11 disagreement, the issue which has caused this dispute is  
12 whether Mr. Mallory attempted to or intended to send  
13 information to Chinese intelligence agents, which arguably  
14 would have allowed Chinese intelligence agents to divine the  
15 identity of human sources of the CIA within China. I stated,  
16 in a previous hearing and it wasn't under seal, that I thought  
17 that was an important issue that I wanted to get resolved,  
18 because I viewed that issue as a factor that I would consider  
19 important in applying the 3553(a) factors. And the reason for  
20 that, as I think I stated at the time -- and Mr. Kamens, Mr.  
21 Gibbs, you have leave to raise your hand if you think I'm  
22 getting into prohibited territory, but I don't think I am. I  
23 think I've said all of this before.

24 But in my view, a defendant who conveys or attempts  
25 to convey information that would identify human resources, or

1 human sources in another country has done something really  
2 serious, because these sources are retaliated against, they're  
3 killed.

4           Indeed, I remember a case in this district in which  
5 precisely that happened. So I wanted to resolve that. And  
6 that on April 4th is what the parties then provided briefing  
7 on, exhaustive briefing, I might say, and more declarations.  
8 I have reviewed all of that. I don't think, Mr. Kamens, that  
9 any further briefing is going to be helpful. I think  
10 everything has been said. I will be shocked and surprised if  
11 there's something that hasn't been said.

12           MR. KAMENS: If I can have one word, Your Honor.

13           THE COURT: Yes.

14           MR. KAMENS: I agree further briefing is not  
15 warranted or helpful.

16           In the Government's pleading on Wednesday they said  
17 something, which I think needs correction. And it bears on  
18 this topic. They said that the jury returned guilty verdicts  
19 as to both the completed passage of document number 1 and 2.  
20 And document 2 is the PowerPoint presentation that contained  
21 information related to an operation and assets. And that is  
22 not accurate.

23           THE COURT: That particular issue was not presented  
24 in the jury to answer "yes" or "no."

25           MR. KAMENS: That's right. There was no special

1 jury verdict, but also the Government --

2 THE COURT: Well, the Government wants me to infer  
3 that the jury decided that.

4 MR. KAMENS: When they were arguing to the jury, the  
5 Government argued when the defense attempts to play up the  
6 fact that document number 1, the white paper, was the only  
7 document we can all agree was actually sent, keep in mind,  
8 that's all you need to convict the defendant of Count II of  
9 the indictment.

10 THE COURT: I recall all of that.

11 MR. KAMENS: And so certainly they argued that the  
12 jury didn't need to find the document.

13 THE COURT: Mr. Gibbs, am I correct that what you're  
14 arguing is that I could infer that from the jury verdict, but  
15 Mr. Kamens says you argued to the jury that they didn't really  
16 need to find all of that. They only needed to find one?

17 MR. GIBBS: That's exactly right, Judge.

18 THE COURT: Thank you.

19 MR. KAMENS: If I can make one further point.

20 THE COURT: I'm not sure you do need to make any  
21 further points.

22 MR. KAMENS: All right.

23 THE COURT: I think both sides have objections to 39  
24 and 40, because it is the defendant's view, or let's start  
25 with the Government's view, that there were many attempts to



1 send these documents on May 4 and May 5, and also on May 1 and  
2 2 by hitting the send button. The defendant has argued,  
3 exhaustively, why I should not draw that inference. It was  
4 the post -- it was the forensic examination of the CovCom  
5 device that enabled the Government to argue that --

6 And by the way, I'm standing for the comfort of my  
7 back and not for any other reason.

8 I've reviewed all of that. I think there is  
9 substantial force to the Government's argument and substantial  
10 force to the defendant's argument.

11 The defendant argues that you know he punched these  
12 buttons, it doesn't show -- and nobody was connected on the  
13 other side so it didn't go through. There's all that  
14 testimony and argument about all of that.

15 I have looked at all of that. My conclusion is as  
16 follows: I think the evidence is an equipoise. So I'm going  
17 to sustain in part and overrule in part the objection to  
18 paragraphs 39 and 40.

19 And I'm going to find as follows, and I'm going to  
20 distribute this to you so that you can follow it. And I'm  
21 going to replace 39 and 40 with what I have prepared and I'm  
22 handing to you at this time.

23 Now, what it shows, I'm going to read along, you can  
24 read along with me. Is that the Government submitted  
25 testimony at trial tending to show that table of contents and

1 white paper with handwritten notes, that was document 1, that  
2 latter one, were sent by defendant to Chinese intelligence  
3 agents, that should say. Not agency. Chinese intelligence  
4 agents via the CovCom device.

5 The parties do not dispute that these two documents  
6 were sent by defendant and received by Chinese intelligence  
7 agents with the CovCom device. Sent and received by them with  
8 the CovCom device. And I want to also note that those two  
9 documents were classified at the secret level.

10 Then in paragraph 40 what I intend to substitute in  
11 lieu of paragraph 40 is the following: The parties sharply  
12 dispute, however, whether the defendant intended and attempted  
13 to send the following documents to Chinese intelligence  
14 agents. And there they're identified in a number of documents  
15 and some of those were classified at the top secret level and  
16 it doesn't show here, but I'm going to make it clear, the  
17 others were classified at the secret level.

18 Now, those are the documents from which a Chinese  
19 intelligence agency or agent might divine the identity of  
20 human sources. I didn't go through all of the testimony, a  
21 presentence report does not have to have all of that in here.  
22 What's important is my resolution of the objection to  
23 paragraphs 39 and 40 and my -- also, I'm going to note, that  
24 resolution of that particular dispute does not affect the  
25 guidelines calculation, it does, and could affect conceivably,

1 my 3553(a) analysis.

2 So let me give you a moment to look at this. In  
3 essence what I intended to say and what I will direct the  
4 probation officer, Ms. White, who's present in the courtroom,  
5 to substitute these two paragraphs for 39 and 40 and that will  
6 address and resolve the party's views or difference of views  
7 as to the existing paragraphs 39 and 40.

8 What I want to leave is I don't want to go  
9 through -- there's no reason a presentence report should have  
10 an extensive discussion of issues at trial or of evidence.  
11 But I think it is useful for the presentence report to reflect  
12 that at least two documents were sent and received by the  
13 Chinese intelligence agencies and agents. But, the other  
14 documents are in dispute as to whether there was an attempt to  
15 send them, because he punched "send" a number of times, and  
16 whether they were in fact sent -- this involves a dispute  
17 about whether somebody needed to be connected at the other  
18 line or not -- or whether he was just playing with keys. And  
19 there's a dispute.

20 And I have elected to -- I have decided to consider  
21 that dispute to be an equipoise in terms of the evidence. And  
22 not to affect the guideline calculation.

23 If you need a short moment to consider, I'll take a  
24 brief five-minute recess, but I don't know that it will take  
25 you any time.

1 Mr. Gibbs, do you have any problem?

2 MR. GIBBS: Judge, I just want to be clear. So the  
3 last sentence says, "resolution does not affect the guidelines  
4 calculation." So, as I read that the -- the top secret  
5 documents drive the guideline calculation. Documents 4 and 5  
6 were the top secret documents. So those are still calculated  
7 as being part of the sentencing.

8 THE COURT: Absolutely. Because you didn't have to  
9 prove that they were actually sent, actually received.

10 MR. GIBBS: Correct.

11 THE COURT: That's why they're still a part of the  
12 guideline calculation.

13 But for my 3553 analysis, I have concluded that the  
14 evidence is an equipoise as to whether they were attempted to  
15 be sent or intended to be sent.

16 MR. GIBBS: I'll have an argument on that. We may  
17 just need a minute, but let me confer.

18 THE COURT: All right. Mr. Kamens.

19 MR. KAMENS: Your Honor, we don't oppose this  
20 resolution. I would suggest in paragraph 39 that it should  
21 reference a single Chinese agent. That is not plural. "Sent  
22 by the defendant to a Chinese intelligence agent."

23 THE COURT: All right. There's no problem with  
24 that, is there, Mr. Gibbs?

25 MR. GIBBS: No, he was communicating with Michael --

1 that's fine, Judge.

2 MR. KAMENS: That's in two places in paragraph 39,  
3 but other than that we don't have any objection.

4 THE COURT: Mr. Gibbs, do you need any more time?

5 MR. GIBBS: No, Judge.

6 THE COURT: All right. Well, I think that then  
7 resolves that dispute and we can now go on to an abuse of  
8 position of trust, which is the only remaining guideline  
9 calculation dispute and I've already adopted the findings and  
10 conclusions of the presentence report as the Court's findings  
11 and conclusions with -- with exception of the rulings that I'm  
12 going to make on the abuse of trust and with the exception of  
13 the substituting paragraphs 39 and 40, as I've provided them  
14 to you.

15 All right. I think I'm familiar with the parties'  
16 arguments on the abuse of a position of trust, but -- oh, let  
17 me also be clear, I didn't disregard your late submissions,  
18 yours of the 10th and yours of this week. Of course I  
19 considered those. They just moved me more persuasively to the  
20 conclusion that it's an equipoise. And I don't need to  
21 determine that.

22 All right. Do you need any more time, Mr. Gibbs?

23 MR. GIBBS: No, Judge.

24 THE COURT: All right. The Court therefore, as I  
25 said, will adopt -- not adopt -- the Court will sustain in

1 part and overrule in part existing paragraphs 39 and 40, and I  
2 will order the current versions of 39 and 40 to be redacted  
3 and replaced with the 39 and 40, as I've read here and as  
4 amended to reflect that it was the one Chinese intelligence  
5 agent.

6 And I also want to be clear that the two documents  
7 in paragraph 39 that were sent by the defendant and received  
8 by a Chinese intelligence agent, were classified at the secret  
9 level. And that's the only changes.

10 All right. We'll proceed now to the enhancement for  
11 the abuse of a position of trust. Mr. Kamens, do you want to  
12 say anything more about that particular dispute?

13 MR. KAMENS: Just briefly, Your Honor. The  
14 application defining the position of public trust in 3B1.3  
15 says that for the adjustment to apply, the position of public  
16 or private trust must have contributed in some significant way  
17 to facilitate in the commission or concealment of the offense.

18 And so we would argue or have argued, in other  
19 words, that the commission of the offense must be at the same  
20 time as the person who occupies the position of public trust.  
21 But in this case, the commission of the offense took place  
22 well after Mr. Mallory was no longer in such a position.  
23 Therefore, the fact that he previously have been in a position  
24 did not occur contemporaneously in the commission of the  
25 offense and therefore the enhancement does not apply.

1 THE COURT: All right. Mr. Gibbs.

2 MR. GIBBS: Your Honor, we obviously dispute that.

3 THE COURT: Well, you wouldn't dispute it factually.  
4 You dispute legally whether it has to be contemporaneous.

5 MR. GIBBS: Exactly, Judge. Again, the enhancement  
6 itself does not restrict itself simply to current employees.  
7 They certainly -- Congress and the sentencing commission  
8 certainly could have done that if they wished. The obligation  
9 notes also don't restrict it simply to current employees. And  
10 here, when we look at Mr. Mallory, is a prime example of why  
11 that's important, because a former intelligence case officer  
12 is uniquely in a position to occupy a position of trust.

13 When someone, like Mr. Mallory, leaves the  
14 Government, which there's millions of clearance holders in  
15 this country, they get read out of whatever programs they are  
16 read into, but they can't suck all that information out of  
17 their head. And Mr. Mallory, like any other clearance holder,  
18 has a great deal of classified information in his head. In  
19 this case, apparently, he had classified documents that he had  
20 retained improperly.

21 So in those cases it's very important that clearance  
22 holders are notified that when you leave government service  
23 your obligation to protect this information continues. It  
24 never ends. And Mr. Mallory was explicitly instructed of  
25 that. We had signed documents where he acknowledged that.

1 And so having acknowledged that and left government service,  
2 essentially pledging to protect that information, this is  
3 clearly an abuse of a position of trust. So the two-level  
4 enhancement should apply in this case.

5 THE COURT: All right. The matter is before the  
6 Court on the defendant's objection to a two-level enhancement,  
7 applied by the probation officer to reflect abuse of a  
8 position of trust. The defendant argues that that would apply  
9 only in cases where the abuse of a position of trust is  
10 contemporaneous with the offense. I don't agree. I think it  
11 is appropriate to apply the enhancement, even though, in this  
12 case, Mr. Mallory had left the CIA and the DIA years before  
13 this event, this crime, and therefore, I don't agree it has to  
14 be contemporaneous. I think it can apply. Indeed, he only  
15 had access to the information. He only retained the  
16 information because of the position of trust that he held at  
17 the time that he was employed by the agency. So I will  
18 overrule that objection, sustain the position of the probation  
19 officer.

20 Let me ask. Ms. White, what now is the offense  
21 level total? It shouldn't change because the ruling I made on  
22 paragraphs 39 and 40 does not change it. What is the final  
23 offense level and criminal history category and guideline  
24 range?

25 THE PROBATION: Your Honor, the total offense level



1 is capped at 43, with a criminal history Category 1 and a  
2 guideline provision of life.

3 THE COURT: All right. Now, we're at the point now  
4 of argument on the sentence and allocution if he wishes by the  
5 defendant.

6 Let's begin with -- let's begin with the Government  
7 on argument as to sentence. And let me confirm, however, Mr.  
8 Kamens, did I -- do I correctly assume that we have obviated  
9 the need for what you anticipated might be a classified --

10 MR. KAMENS: Your Honor --

11 THE COURT: Or would you prefer to wait until Mr.  
12 Gibbs argues and then you'll tell me?

13 MR. KAMENS: I'm happy to tell you our reasoning for  
14 why I think it still would be helpful. The sentencing -- the  
15 sentencing statute 3553(a) requires that we're to consider the  
16 seriousness of the offense. And in other cases, and in the  
17 study that we submitted to the Court, oftentimes Courts in  
18 these circumstances consider the value of the information lost  
19 as a measure or a proxy of the degree of culpability of the  
20 defendant or the seriousness of the offense.

21 And so we would like to discuss what we have agreed  
22 was given to the Chinese agent.

23 THE COURT: All right. Now, Mr. Gibbs, rather than  
24 begin then with you, let's begin with that position by the  
25 defendant so that you have an opportunity to address it.

1 MR. GIBBS: Thank you, Judge.

2 THE COURT: All right. For that, I'm afraid we will  
3 have to clear the courtroom because you intend to -- is there  
4 a court -- yes, there she is. A court security officer is  
5 here.

6 Have you reviewed with Mr. Kamens what he intends to  
7 disclose?

8 THE CSO: Yes, Your Honor.

9 THE COURT: Is it classified?

10 THE CSO: I believe so, Your Honor.

11 THE COURT: All right. Well, I'll have to ask all  
12 of you to depart. We'll have to close the courtroom for a  
13 while. And the court security officer, Mr. Flood, will tell  
14 you when you may return. I anticipate this will be on the  
15 order of 30 to 45 minutes.

16 MR. KAMENS: It could be much shorter than that,  
17 Your Honor.

18 THE COURT: All right. It could be. Let's hope  
19 that it is. I'll take a brief recess while Mr. Flood empties  
20 the courtroom.

21 Is there anybody, Mr. Gibbs, that you want to remain  
22 here, anybody from the agency?

23 MR. GIBBS: There are some people -- in fact maybe,  
24 Your Honor, if I could just ask them to stand, then I can have  
25 them identify themselves and their agency affiliations.

1 THE COURT: All right.

2 MR. GIBBS: Go ahead.

3 MR. VERA: Fabian Vera, I'm the director at the  
4 national intelligence. I was the paralegal on this case.

5 THE COURT: I didn't hear the last thing you said.

6 MR. GIBBS: So Mr. Vera, he was actually the  
7 paralegal on this case. He's now the director of national  
8 intelligence.

9 THE COURT: All right. Who else?

10 MR. BALFANZ: Chad Balfanz, the defense intelligence  
11 agency, Your Honor.

12 THE COURT: All right. Next.

13 MR. BINI: Steven Bini, defense intelligence agency,  
14 Your Honor.

15 THE COURT: All right. Next.

16 MS. STEWART: Hannah Stewart, for the Central  
17 Intelligence Agency.

18 THE COURT: All right.

19 MS. EDELSTEIN: Julia Edelstein, national security  
20 division at DOJ.

21 MR. BRATT: Jay Bratt, national security division,  
22 Department of Justice.

23 MR. GAYNOR: Ryan Gaynor, Federal Bureau  
24 Investigation, national security.

25 MR. TURGEON: Evan Turgeon, national security

1 division at DOJ.

2 MR. HAMMERSTROM: Neil Hammerstrom, U.S. Attorney's  
3 office.

4 UNIDENTIFIED SPEAKER: And I'm employed with the  
5 FBI.

6 THE COURT: I'm sorry.

7 UNIDENTIFIED SPEAKER: FBI.

8 THE COURT: All right. Anyone else?

9 All right. Now, I assume, Mr. Gibbs, you were  
10 asking to have all of these people remain and we'll ask the  
11 court security officer to verify that they may remain.

12 When we reconvene, Mr. Kamens, I'll give you an  
13 opportunity to tell me what you want to tell me relating to  
14 the value or lack of value of the NDI.

15 MR. KAMENS: Thank you.

16 THE COURT: And then, Mr. Gibbs, you'll have an  
17 opportunity to respond.

18 MR. GIBBS: Thank you.

19 THE COURT: Just so I can plan ahead, does your  
20 client intend to allocute?

21 MR. KAMENS: He does. However, I advised him not to  
22 say anything about the facts of the case, but he does intend  
23 to provide a brief statement.

24 THE COURT: Court stands in recess.

25 Will ten minutes be enough for you to clear the

1 court?

2 THE CSO: Yes, Your Honor.

3 THE COURT: Court stands in recess for ten minutes.

4 (Recess.)

5 (Sealed hearing held but not included herein.)

6 (Open court proceedings resumed at 2:11 p.m.)

7 THE COURT: All right. We'll proceed now to  
8 argument and allocution.

9 Let me note for the persons who were excluded from  
10 the previous session, that I have directed the Government to  
11 review the transcript and to put in the public record those  
12 portions of it that do not need to be protected as classified.  
13 That doesn't mean it will make sense to you, but it will be  
14 there anyway.

15 All right. Mr. Gibbs, let's begin with the  
16 Government's view. I have your brief, of course.

17 MR. GIBBS: Thank you, Judge.

18 Your Honor, at its heart, this was a very basic  
19 crime. The defendant needed money, he was desperate for  
20 money, and the most valuable thing he had to sell were our  
21 nation's secrets. He was more than willing to sell those  
22 secrets to one of our most serious adversaries, the Chinese  
23 Government, for the right price.

24 As he told Michael Yang on that CovCom device, "Your  
25 object is to gain information and my object is to be paid.

1 The opportunity to work with you provided a means to generate  
2 income. I have arranged for a USD account in another name.  
3 You can send the funds broken into four equal payments over  
4 four consecutive days. When you agree, I will send you the  
5 banking instructions. I will provide you banking instructions  
6 for you to send the monies. The money will go to the bank  
7 account. It's not in my true name, but I have access.

8 I have an account not in the U.S. you can send it to  
9 and I have the means to move it from there. If you can get me  
10 reimbursed, I can provide you the mechanism."

11 This defendant was so eager to get paid a lot of  
12 money that he even told Michael Yang that CBP had seized the  
13 cash from him during the airport search in April. "I am  
14 expecting the previous payment, 15K plus \$4400, seized at the  
15 border and at least 'dollar sign question marks.'"

16 THE COURT: He didn't tell Michael Yang that he got  
17 the money back.

18 MR. GIBBS: He did not. And he told him he wanted  
19 money for the materials I have provided.

20 And he also told him, "When you get the okay to  
21 replace the prior payment, then I will send more docs."

22 As Your Honor noted this wasn't true. CBP had given  
23 that money back. But this was a defendant who wanted to get  
24 paid a lot of money and he viewed the Chinese government as  
25 the means to do that.

1 And this need for money wasn't an exaggeration. As  
2 Your Honor will recall from the PSR, in the five years from  
3 2012 to 2017, defendant made only \$23,000 from his consulting  
4 firm GlobalEx. He made more than that in one month from the  
5 Chinese government. And that was before they ever gave him  
6 the CovCom device.

7 He was arrested in June of 2017. Even with help  
8 from his church, his family had to declare bankruptcy in  
9 December of 2017. And as for the mortgage on his house, the  
10 first lender said he had made no payments in 18 months and the  
11 balance due was over \$900,000 and the house is worth \$400 less  
12 than the defendant paid for it.

13 And in the PSR the defendant's net worth is listed  
14 more than negative \$34,000.

15 Your Honor, this is a defendant who is going to need  
16 hundreds of thousands of dollars to get out of that hole.  
17 \$25,000 was just a drop in the bucket.

18 That wasn't going to be enough money to get him to  
19 stop. And given how desperate he was for money, the defendant  
20 had to convince Michael Yang that he had a lot of valuable  
21 information to sell, which is precisely what he did.

22 On May 1st he successfully transmitted the  
23 handwritten table of contents and the first document listed  
24 there, Document No. 1. Michael Yang told him he had received  
25 them both.

1           And at that point, the defendant made two things  
2 clear. First he told him that the table of contents was a  
3 laundry list of some of the things that he could provide and  
4 sell. And secondly, that he was going to need to get paid  
5 before he would provide those additional documents. So he  
6 told Yang on the CovCom, "The index or table of contents list  
7 the document number and topic. I have additional documents as  
8 I can see from the index. I will send more later. I will  
9 send more docs when payments are made. I suggest your boss  
10 review the index and I will send another document as a sign of  
11 trust."

12           And as for Document No. 1, that was that document  
13 with the very bland title of white paper. But the defendant  
14 renamed it S&T Targeting opportunity on the table of contents  
15 and S&T Targeting in China on the handwritten cover sheet.

16           And that was a title that had to pique Michael  
17 Yang's interest, especially after the defendant told him that  
18 this was a type of targeting and that S&T stands for Science  
19 and Technology.

20           Now, Your Honor, the fact that the defendant started  
21 off by sending this particular document was absolutely  
22 chilling. He could have provided anything in the world to  
23 Michael Yang, but the first thing he decided to send right out  
24 of the box was a document that related to human assets, the  
25 Johnsons. And as Robert Ambrose from DIA testified, the white



1 paper was a virtual executive summary of that longer  
2 PowerPoint presentation, which was a full-blown operational  
3 brief on how to use the Johnsons in a targeting operation in  
4 China.

5 S&T Targeting in China. And we can tell that  
6 Michael Yang and the Chinese intelligence service read this  
7 white paper carefully because he told the defendant, "No. 1  
8 seems to be a beginning of a report." A beginning of a  
9 report. That sure does sound like an executive summary just  
10 as Ambrose testified. And it sure makes it sound like the  
11 Chinese intelligence service was reading this document very  
12 carefully and they wanted to know more.

13 And in fact, Michael Yang even told the defendant:  
14 No. 1 is obvious the first page of an incomplete article.  
15 Where is the else? And why is it black on top and bottom?

16 Your Honor, there is simply no way that the  
17 defendant would dangle this information about the Johnsons and  
18 then not follow through with more. Especially when you have  
19 the Chinese intelligence service which is going to pay him  
20 asking, "Where is the else?"

21 And in fact, four days after sending the white paper  
22 about the Johnsons, the defendant attempted to send the else.  
23 He attempted to send that PowerPoint and he told Michael Yang  
24 on the CovCom device that it was on the way. He told him the  
25 name of that document in the CovCom discussion.

1           Now, it can't be a mere coincidence that this  
2 defendant, who was so desperate for money, would make the  
3 first two documents that he put on that SD card, information  
4 about a targeting operation in China involving the Johnsons.

5           And also it can't be a coincidence that the Johnsons  
6 had started to hear from the defendant a lot more right around  
7 this time. In late March, after having received a total of  
8 three short LinkedIn messages from the defendant over a  
9 three-year period, the Johnsons suddenly got nine messages  
10 from this defendant in two days.

11           Are we really expected to believe that that was  
12 harmless, that it had nothing to do with Michael Yang and the  
13 Chinese intelligence service? When those dates occurred  
14 precisely between the defendant's two trips to China. This  
15 defendant knew where the Johnsons lived, he knew how to  
16 communicate with them, he knew that they trusted him, he even  
17 knew that they were planning a trip to China that summer, and  
18 he was in active contact with Michael Yang.

19           Now, undoubtedly, and as the defense has already  
20 argued, they want to argue that the information in this white  
21 paper, the S&T Targeting in China, were simply too vague to  
22 ever specifically identify who the Johnsons were. But that's  
23 exactly the point. For the defendant, that's a good thing,  
24 not a bad thing, because if it's too vague to fully identify  
25 everything in there, that makes him valuable. That makes him

1 someone that the Chinese need to pay a lot of money to so that  
2 he will explain who those sadists, those people, in the white  
3 paper were. And the defendant was more than happy to go to  
4 China again. Two days after the May 24th interview with the  
5 FBI, he sent an e-mail to Michael Yang that had the subject  
6 "travel." And he told Yang, "Will you make the reservations  
7 today, please?" That was May 26th.

8 Now, the third trip to China was going to happen for  
9 this defendant. He had already made it clear that that was  
10 when he would really provide some valuable information. On  
11 that CovCom device, he had told Michael Yang, "The notes must  
12 be relayed in a conversation. They were my notes. It would  
13 have to wait until the next trip."

14 And he also had told him, earlier in May, "I can  
15 also come in the middle of June. I can bring the remainder of  
16 the documents I have at that time."

17 The remainder of the documents would have to include  
18 that PowerPoint about the Johnsons. It would have to include  
19 everything else on that SD card. And Yang responded, "If you  
20 think the situation is okay and you're available, you may  
21 still come in June."

22 So, Your Honor, that's why this information that the  
23 defense -- the defendant had already provided to the Chinese  
24 and he was conspiring to the Chinese was so chilling. He had  
25 parceled this out for the Chinese intelligence services. This

1 was information about human assets, it was about targeting  
2 operations, he had clearly gotten their attention. They were  
3 reading this stuff very carefully, and now he was planning a  
4 third trip to China.

5 He didn't need the CovCom device to transmit that  
6 information to the Chinese, he could give it to them in  
7 person. And, Your Honor, ultimately that is what makes this  
8 such a tremendous betrayal on the part of the defendant. He  
9 was the Johnsons former handler. For people like the Johnsons  
10 who step forward to help this country, they have to believe  
11 that their help is based on an unbreakable promise. That if  
12 they do something as dangerous as a targeting operation  
13 against China, that our government will protect them. That  
14 they will be protected, and that their former handler won't  
15 betray them. But despite his 30 years in the intelligence  
16 world, despite all the promises he made to protect classified  
17 information, despite acknowledging that this was a life-long  
18 obligation, the defendant violated his oath, he violated every  
19 trust that was placed in him.

20 But, Your Honor, as bad as this betrayal was, this  
21 conspiracy shouldn't be seen as being simply limited to just  
22 the Johnsons. In order to make all the money that he was  
23 going to need to make, the defendant would have to sell the  
24 Chinese a lot more information than that. Anything in his  
25 head was fair game.

1           Those two top secret documents involved assets, that  
2 was fair game. Anything he knew about other assets about  
3 classified programs, about how the U.S. Intelligence Service  
4 operate, and about what they do in China, all of that would be  
5 up for sale.

6           And the defense claimed that this is a conspiracy  
7 that only involved the two documents that were successfully  
8 passed, is just really an attempt to benefit from the  
9 outstanding work of the FBI in arresting this defendant so  
10 quickly. But as Your Honor noted in the detention hearing,  
11 when the defense made a similar argument about how this should  
12 only be seen as a case involving two documents, because  
13 that -- that's what the Government could show he had passed at  
14 that point, that's now how these crimes work.

15           Espionage is not a crime where you sell all of your  
16 information at one time for one price. You draw it out over  
17 time to get paid a lot of money.

18           By the spring of 2017, Kevin Mallory needed to get  
19 paid a lot of money. He was going to need to keep this  
20 criminal conspiracy going for a long time. And he was going  
21 to need to sell a lot of information. This was a frightening  
22 conspiracy, precisely because of how much damage this  
23 defendant was prepared to do to this country.

24           For that, he deserves a just punishment. He  
25 deserves a punishment within the guidelines.

1           And a moment ago, Judge, you asked about if we  
2           needed to address the 3553 factors. We did that in our  
3           pleadings but it's worth reiterating. In terms of those  
4           factors, the seriousness of the offense and providing just  
5           punishment, it's telling that in a case like this that involve  
6           top secret information, the statute that was charged carries  
7           up to life in prison, it could be a death penalty case if a  
8           death results. It only took two enhancements and the  
9           defendant was up at a level 43, which carried life in prison.

10           This is about as serious an offense as there is.  
11           But betraying your country, selling your country's secrets, is  
12           in fact a very serious offense. And a just punishment should  
13           be a punishment that carries a great deal of time for this  
14           defendant.

15           In terms of deterrence, general and specific, it  
16           comes back to the offense itself and how serious this crime  
17           is. The general deterrence is important, because there are  
18           millions of clearance holders out there and should any of them  
19           be tempted to sell classified information to our adversaries  
20           it's important to understand that these are serious offenses  
21           and it does have an impact when the penalties that are imposed  
22           in these types of crimes are very high.

23           As far as specific deterrence in protecting the  
24           public, it is important to protect the public from further  
25           crimes of this defendant. This is an unusual type of crime

1 because so much of this information is information that  
2 resides in his head. This is a former CIA case officer.

3 And as the Court knows, two days after being in  
4 jail, the defendant was calling his family about that SD card.  
5 The defendant has been under special administrative measures  
6 really since he was first put in custody. That will continue.  
7 That will have to continue. But in terms of specific  
8 deterrence in protecting the public from further crimes of  
9 this defendant, those 3553 factors also weigh in favor of a  
10 heavy sentence.

11 So, Your Honor, that really concludes my comments.  
12 This is a very serious offense. This was a conspiracy offense  
13 that the defendant plainly hoped will last for a long time,  
14 that will be financially profitable, but in order to make that  
15 a reality, he had to sell a great deal of information to the  
16 Chinese government, which he was fully prepared to do.

17 Thank you, Judge.

18 THE COURT: Mr. Kamens.

19 MR. KAMENS: Thank you, Your Honor. The first line  
20 of paragraph 40 of the PSR that the Court has drafted states  
21 that the parties sharply dispute whether the defendant  
22 intended and attempted to send any document other than the  
23 table of contents and the white paper. And the reason that  
24 the parties were in such sharp dispute and the reason that we  
25 spent so much time addressing that issue is because it

1 directly relates to this Court's evaluation of Mr. Mallory's  
2 culpability.

3           According to the prosecutor, Mr. Gibbs, after a  
4 30-year career in the military and in the Intelligence  
5 Community, Mr. Mallory turned 180 degrees and was prepared to  
6 do anything and give anything to the Chinese in return for  
7 money. The words that he used were "everything was fair game"  
8 "everything was up for sale."

9           And so the prosecutor's arguments is about the fear  
10 of what Mr. Mallory intended. Even if he wasn't necessarily  
11 successful in sending anything but the table of contents, and  
12 the white paper, he intended to do much more and much worse.

13           The defense view is that this case is much more  
14 complicated. It is not black and white. A person does not  
15 turn and decide one day to throw away a 30-year career in the  
16 military and in the Intelligence Community and his life of  
17 service to this country for \$25,000.

18           Yes, he was prepared and did send a Chinese agent  
19 the table of contents and the white paper. But, no, he was  
20 not prepared and did not attempt to send the PowerPoint  
21 document, Document No. 2 that contained specific information  
22 about that intelligence asset and operation.

23           One compelling piece of evidence, in favor of our  
24 view, is the creation of the white paper itself. Why create  
25 it? Why create this executive summary if not to strip out all



1 of the information that would potentially provide information  
2 about the Johnsons or more detailed information about this  
3 operation.

4 As we just discussed in the previous session, there  
5 is nothing about any specific intelligence agency, nothing  
6 about any assets, nothing of significant value in the white  
7 paper.

8 Now the Government, Mr. Gibbs, says that he intended  
9 and meant to send Document 2, but as the Court has seen in  
10 exhaustive briefing, there is no send consequence associated  
11 with Document 2. The first argument from the Government is  
12 well he's been pushing these buttons, but there are no buttons  
13 associated with an attempt to send Document 2, the PowerPoint.  
14 But Mr. Gibbs says: Listen, he was talking to Michael Yang  
15 about bank accounts. He said there's one that's a foreign  
16 account and you can deposit money there.

17 But in all of this extensive investigation, there  
18 are no foreign bank accounts that were ever found to be  
19 associated with Mr. Mallory. There is no evidence that he  
20 ever received any money in return for sending the table of  
21 contents and the white paper. In fact, the money in this case  
22 is extraordinarily modest in comparison with other cases in  
23 which individuals have been convicted of conspiring to submit  
24 documents and intelligence to the Chinese.

25 It reflects --

1 THE COURT: Mr. Gibbs says that's because the FBI  
2 acted with alacrity, caught him and arrested him.

3 MR. KAMENS: Mr. Mallory went to the CIA, he went to  
4 the FBI, he turned over the phone. The reason they acted with  
5 alacrity is because of Mr. Mallory.

6 THE COURT: Well, that's true. Mr. Mallory is the  
7 reason they acted with alacrity.

8 MR. KAMENS: In that he intentionally contacted the  
9 CIA.

10 THE COURT: Yes.

11 MR. KAMENS: He did not throw away the phone. He  
12 set up the meeting with the -- with --

13 THE COURT: It's not clear he really understood  
14 well, despite the instructions given to him by the Chinese  
15 agents, how the phone worked.

16 MR. KAMENS: Well, if someone who was concerned  
17 about being uncovered as an agent of the Chinese, certainly  
18 would have destroyed the phone before they handed it over to  
19 be copied by the Government. At least that's our view.

20 THE COURT: All right.

21 MR. KAMENS: But in any event, it reflects the lack  
22 of value that Mr. Mallory actually provided to the Chinese in  
23 that he only received on his trips \$10,000 for the first and  
24 15 on the second, which was under the guise of consulting for,  
25 initially, this think tank.

1 THE COURT: He also asked the Chinese for money that  
2 wasn't in fact seized from him, the Custom and Border Control  
3 people returned to him the money.

4 What do you say to the notion that he was obviously  
5 so hungry for money that he tried to have the Chinese pay him  
6 for the money that he got back from the Customs and Border  
7 Control.

8 MR. KAMENS: It suggests that he was not, in that  
9 sense, aligned with Chinese interests, and that he said many  
10 things to the Chinese that were not true.

11 THE COURT: Well, I must say, Mr. Kamens, that  
12 particular statement I find unconvincing.

13 MR. KAMENS: It is certainly --

14 THE COURT: I think the evidence in the case points  
15 very compellingly to the fact that he needed money.

16 MR. KAMENS: And we've conceded that.

17 And I think that is a part of the reason that he  
18 said to the Chinese he -- he lied to the Chinese, and said  
19 this money was seized when in fact it hadn't.

20 THE COURT: Well, I don't doubt that he may have  
21 lied to the Chinese, but that doesn't give him an escape hatch  
22 here.

23 MR. KAMENS: Well, all I'm saying is that Mr.  
24 Mallory was not in complete alignment with the interest of the  
25 Chinese government here. And the Government may be right that

1 he was in financial straits, but at the bottom of this case is  
2 a relatively modest amount of funds compared to other cases.

3 THE COURT: Yes, but Mr. Gibbs would say immediately  
4 that's because we caught him and arrested him before he could  
5 do any more harm and get any more money.

6 Is that what you would say, Mr. Gibbs?

7 MR. GIBBS: Absolutely, Judge.

8 MR. KAMENS: But again --

9 THE COURT: Thank you.

10 MR. KAMENS: And I don't mean to be speaking in  
11 circles.

12 In other cases where individuals have obtained much  
13 more money. For example, Mr. Hanssen, who was prosecuted in  
14 Utah, he received \$800,000. And he --

15 THE COURT: Oh, yes. How about Mr. Aldrich Ames,  
16 who received millions? Why? They didn't catch him.

17 MR. KAMENS: And they didn't go in and turn  
18 themselves in for meetings with the CIA or the FBI.

19 THE COURT: Yes. That's an interesting aspect of  
20 this case and I'll remark on that in a few minutes.

21 MR. KAMENS: My ultimate point here is simply that  
22 if this offense presented the -- the significant harm that Mr.  
23 Gibbs talks about, Mr. Mallory would receive much more money  
24 than he did, and I think that the value of the money he  
25 received, reflects on the value of the information that was

1 provided.

2 THE COURT: All right. Anything further?

3 MR. KAMENS: Briefly, a couple of other points, Your  
4 Honor.

5 The Court should also keep in mind the value of the  
6 information that Mr. Mallory provided to the U.S. Intelligence  
7 Community. The Government's expert, Paul Lee, said at the  
8 trial that Mr. Mallory wanted to show the FBI how the Samsung  
9 phone worked and brought along notes so he could explain  
10 precisely how to get into the secret communication mode of the  
11 phone.

12 THE COURT: He didn't have it right, did he?

13 MR. KAMENS: He did. They were able to get in.  
14 They put it in the Faraday bag --

15 THE COURT: He didn't have the operation of the  
16 phone entirely right.

17 MR. KAMENS: In terms of getting into the covert  
18 mode of the phone he did. I think that the instructions were  
19 correct. And he allowed them to be copied.

20 THE COURT: But you concede there were other aspects  
21 of the phone he didn't have a right to.

22 MR. KAMENS: And I absolutely may not be fully  
23 technically under -- with full apprehension of --

24 THE COURT: I don't recall that the trial  
25 testimony -- did the Government put on any evidence that he

1 told them all about steganography?

2 MR. GIBBS: Your Honor, they asked some questions.  
3 I don't think he recognized it as that particular term. They  
4 asked him, "Is this steganography?" He said, "no."

5 But what he essentially described, concealing a  
6 document with a picture, that is steganography.

7 THE COURT: All right.

8 MR. KAMENS: That's correct. Yes, I think the  
9 terminology was something he didn't understand.

10 THE COURT: Go on, Mr. Kamens.

11 MR. KAMENS: Just to follow up, Mr. Lee, the  
12 Government's expert, said that Mr. Mallory's effort at  
13 presenting them the phone and how to get into this  
14 communication mode, the secret communication mode, allowed the  
15 FBI to immediately get a "rare glimpse into Chinese  
16 technology."

17 THE COURT: He also thought, as I recall, that  
18 things have been erased from the phone as a matter of  
19 security. And he was visibly surprised, as I recall the trial  
20 testimony, to learn that that was not the case.

21 MR. KAMENS: And I think there was testimony about  
22 that. I don't think there was any indication that Mr. Mallory  
23 was the author of the deletions of anything on the phone.  
24 That is that --

25 THE COURT: No, he expected it was automatically

1 deleted. And to his surprise, and I suppose disappointment,  
2 it wasn't because the material left on the phone was not  
3 exculpatory.

4 MR. KAMENS: Regardless of what he may have expected  
5 to be viewed at that time, he did turn over the phone for  
6 complete copying by the Government and --

7 THE COURT: Yes, you're correct.

8 MR. KAMENS: So just to be clear, the reason that  
9 the Government was able to interrupt this communication  
10 between Mr. Mallory and the Chinese agents was because of Mr.  
11 Mallory.

12 I want to note briefly the Hanssen case that I said  
13 involved much more money, much longer period of time, no  
14 effort by Mr. Hanssen at any point to contact the FBI. And he  
15 also tried to recruit DEA -- a DIA agent --

16 THE COURT: But in the end he pled guilty and  
17 cooperated.

18 MR. KAMENS: He did. The cooperation, as I  
19 understand it, is not something that would result in any  
20 reduction. And I've spoken to the lawyers in the case, but as  
21 I understand it, as they plea to based on his effort to  
22 provide information to the Chinese and he received \$800,000  
23 and the sentence agreed upon is 180 months.

24 We also pointed to the *Underwood* case in D.C. in  
25 which an individual was a top secret cleared contractor who

1 asked for millions of dollars from the Chinese in return for  
2 planting listening devices in a new consulate to be built in  
3 Guangzhou. That defendant actually fled after he was  
4 originally arrested. And he also, according to the  
5 Government's pleading, lied repeatedly in debriefings. And in  
6 that case the Court sentenced him to 108 months.

7 It's also, as we've detailed in our papers,  
8 important for the Court to consider Mr. Mallory's life leading  
9 up to the offense. That he's been devoted in his career to  
10 his country, to his family, and to his church. We've detailed  
11 that he is 61 years old. He has two children in college, he's  
12 about to have a third, who will also attend BYU.

13 His entire career has almost entirely been either as  
14 a soldier or in the -- as a member of the U.S. Intelligence  
15 Community.

16 And we suggest, given the lack of value of  
17 information that actually was delivered to the Chinese, the  
18 significant value of what Mr. Mallory provided to the U.S.  
19 Intelligence Community, and his life of service to this  
20 country, we'd ask the Court for a sentence of 120 months --

21 THE COURT: All right.

22 MR. KAMENS: -- of imprisonment.

23 THE COURT: Thank you.

24 MR. KAMENS: The last thing I'll ask for is a  
25 designation to a facility as close as possible to Salt Lake



1 City, which is where I understand his family will be  
2 relocating to be near his children.

3 THE COURT: All right.

4 Mr. Mallory, this is now your opportunity to address  
5 the Court and to say anything at all you wish to the Court by  
6 way of extenuation, mitigation, or indeed anything you think  
7 the Court should know before sentence is imposed. You're not  
8 required to say anything, but you have the opportunity to do  
9 so if you wish to.

10 Do you wish to say anything?

11 MR. KAMENS: Your Honor, just to be clear, I've  
12 advised him not to say anything about the facts of this case.

13 THE DEFENDANT: Your Honor, I just want to say that  
14 my love for our country has never wavered and that I love my  
15 family deeply.

16 THE COURT: What did you say about your love for  
17 your country?

18 THE DEFENDANT: My love for United States has never  
19 wavered and my love for my family is very deep.

20 THE COURT: All right.

21 Any reason why the Court should not now impose  
22 sentence?

23 MR. KAMENS: No, Your Honor.

24 MR. GIBBS: No, Your Honor.

25 THE COURT: Mr. Kamens, I didn't hear you.

1 MR. KAMENS: I said no, Your Honor.

2 THE COURT: All right. Thank you.

3 Mr. Mallory, you stand convicted of the very serious  
4 crime of espionage, that is engaging in a conspiracy to gather  
5 or deliver national defense information to aid a foreign  
6 government, and in this case, the People's Republic of China.

7 Few crimes are as serious as that. The law requires  
8 that I consider a number of factors in imposing an appropriate  
9 sentence. First, your personal history and characteristics,  
10 about which I know a good deal in view of the presentence  
11 investigation report, and the materials submitted by your  
12 counsel. And, yes, you have served in the Intelligence  
13 Community and you did serve in the military, as I recall, on  
14 two occasions. That is for two periods.

15 But engaging in espionage, Mr. Mallory, is to erase  
16 some of that. Now, your counsel has argued vigorously about  
17 the lack of value of anything you turned over. The evidence  
18 that I heard discloses that you needed money. And you were  
19 prepared to do things to get money, including criminal things,  
20 like selling what you knew to the Chinese if you could.

21 I think Mr. Gibbs is correct that the way in which  
22 typical espionage works is you don't trot it all out, you  
23 dribble it out and see where it takes you. The fascinating  
24 thing and confusing thing about the record in this case is  
25 that you seemed to want to play a double role. That is to be

1 a spy for China and to be a double agent or try to talk the  
2 CIA into hiring you, or perhaps, you thought, I'm not sure,  
3 that by going to the CIA or making an occasional call to  
4 somebody you knew in the CIA would somehow protect you, that  
5 you could walk that fine line.

6 Well, the message should go forth from here today to  
7 everybody in the Intelligence Community, you cannot do that.

8 If you choose to play footsie with another country  
9 and give information to another country, you have made a  
10 decision to commit a crime. And calling up somebody and  
11 telling them things and asking them to put you in touch with  
12 this or that person and this or that desk is not going to save  
13 you.

14 What you have to do when you're contacted by  
15 somebody from another country and you know that they're making  
16 a run at you, you tell them no, you report it and you run. Do  
17 not play footsie. Don't think you can be a double agent.  
18 That's fatal.

19 So the law requires that I consider your personal  
20 history and characteristics, which I have. The law requires  
21 that I impose a sentence that promotes respect for the law,  
22 that provides just punishment for the offense, and serves to  
23 deter you and to deter others. That is, this sentence must  
24 stand as a beacon, as a warning to others, not to engage in  
25 this sort of conduct.

1           We spent a great deal of time in this case, because  
2 I focused sharply on whether Mr. Mallory disclosed or intended  
3 to disclose sources. That is, individuals who provide  
4 information to the Intelligence Community. I thought that was  
5 very important.

6           In the end, I concluded that the evidence was in  
7 equipoise, but when I said that he intended or attempted to,  
8 intended at that point in time. His long term intentions, I  
9 think, are more sinister, but I don't know for sure what would  
10 have developed. He needed money, he was going to do what he  
11 had to do to get the money.

12           For example, I pointed out that he lied to the  
13 Chinese when he said: You got to pay me for this money that  
14 was taken from me in Chicago at the airport by Customs and  
15 Border Patrol, but when in fact Customs and Border Patrol had  
16 given him the money back. That's how bad his need for money  
17 was.

18           I'm not moved by the fact that he was lying to the  
19 Chinese. I wouldn't doubt that anybody who commits a crime  
20 would lie to both sides. And indeed he did make some  
21 misrepresentations in the course of his interviews. Indeed,  
22 that's reflected in the -- in the guidelines calculation.

23           Am I correct, Mr. Gibbs?

24           MR. GIBBS: It is. And Count 4 is a false statement  
25 count as well. That's right, Judge.

1 THE COURT: That's right.

2 So I'm not surprised. Espionage is typically  
3 committed for one or all three specific reasons. One is  
4 ideological. For example, I would assume that the Rosenbergs  
5 are in that category, or at least he is.

6 The second reason is money. This defendant is in  
7 that category. So, I think, was Aldrich Ames in that category  
8 and others.

9 But his wasn't ideological. His, by that, I mean  
10 this defendant, his purpose was money.

11 A third purpose that I don't think had much to do  
12 with this case, but it may have been, is where someone feels  
13 wronged by the Government of this country and seeks to get  
14 back at him.

15 Those are the three reasons that I've seen from many  
16 of the espionage cases.

17 But it's pretty clearly to me that in this case he  
18 really needed money. For some reason, he concluded that he  
19 could play both ends here. That he could go to the FBI and  
20 tell them things and that will give him immunity from what he  
21 was doing and he could, at the same time, get more money from  
22 the Chinese.

23 As I've said, it doesn't work.

24 Now, the law requires that I consider the  
25 guidelines, which are life in prison. They're not mandatory,

1 they're advisory. I have considered all of the factors in  
2 this case and it is the judgment of this Court, and I say  
3 "judgment" advisedly.

4 A criminal sentence is not a mathematical  
5 calculation, it is a judgment based on a variety of factors.  
6 The Congress makes a judgment about maximum penalties, the  
7 Sentencing Commission makes judgments about guideline ranges  
8 in various categories. And ultimately, the sentencing judge  
9 has to make a judgment about a particular sentence in a  
10 particular case.

11 It is my judgment that this defendant should be  
12 committed to the custody of the Bureau of Prisons with respect  
13 to Count 1 for a period of 240 months. Upon release from  
14 confinement, he is to serve five years of supervised release.  
15 He's to pay a \$100 special assessment. The presentence report  
16 did not disclose that he could afford any fine.

17 Ms. White, is that correct?

18 THE PROBATION: That is correct, Your Honor.

19 THE COURT: No fine is recommended.

20 With respect to Count 2, the Court concludes that he  
21 should be committed to the Bureau of Prisons for a period of  
22 five years. And that time is to be served concurrently with  
23 it. So it's a total sentence of 242 [sic] months.

24 I didn't impose, Mr. Gibbs, I did not impose --

25 Did you hear what I said, Mr. Richman [sic]?

1 MR. KAMENS: I think you meant 240 months, Your  
2 Honor.

3 THE COURT: Oh, what did I say?

4 MR. KAMENS: 242.

5 THE COURT: That's right. 240 months. You're quite  
6 right. If I said 242, I misspoke.

7 Mr. Gibbs, I didn't impose life. It was a closer  
8 question. I was moved by a number of things, including  
9 arguments made and the alacrity, which is good, with which the  
10 Government moved to have him arrested.

11 If I had determined -- and I want this message to be  
12 taken back and made clear to the Intelligence Community. Let  
13 me see your hands. I want to be sure you're here -- yes,  
14 good.

15 If I had concluded that sources had been  
16 compromised, as did occur in the Aldrich Ames case, and in  
17 other cases, I would impose a far more severe sentence. That  
18 is, a betrayal that has very, very severe consequences, as Mr.  
19 Gibbs argued.

20 But I didn't conclude that in the end, Mr. Gibbs.  
21 Now would he have done it if he gone on for a year or two and  
22 gotten hundreds of thousands? Who knows. But I'm not going  
23 to sentence him today for that kind of speculation. But I  
24 think you were correct to raise the specter of that occurring  
25 and it might have occurred.

1 But, I think ten years that you recommended, Mr.  
2 Kamens, is not enough to reflect the seriousness of it, not  
3 enough to reflect his conduct, and certainly not enough to  
4 provide for general deterrence in the public.

5 This is serious stuff and a crime and it needs to be  
6 communicated to people in the Intelligence Community that  
7 disclosure of this material to a foreign government is going  
8 to lead to a very long sentence.

9 Mr. Mallory is now 61 years old. It can be argued  
10 that 20 years is a life sentence. I hope not, because I'm  
11 there and I intend to live a little longer. I'm much older  
12 than you are, Mr. Mallory. But it is serious and I want  
13 people in the Intelligence Community to be aware of that of  
14 this sentence and what I've said is to have any deterrent  
15 effect that needs to be made public to the Intelligence  
16 Community.

17 Don't play footsie with other agents and think you  
18 can use that to absolve you or to preclude you from getting a  
19 severe sentence. I was not moved by your argument, Mr.  
20 Kamens, that I should take into account the value of what he  
21 gave the Government. No. After what he had done, it was too  
22 late. He should not have done that.

23 I don't know precisely what was going on in his  
24 head. I think Mr. Mallory fancied that he could walk that  
25 line in fooling the Chinese that he was going to be their



1 agent for a long time, give them a lot of valuable stuff, and  
2 also persuade the Intelligence Community to give him a job  
3 back there and pay him some money too. Not going to happen.

4 That message should be loud and clear.

5 You're to pay \$100 special assessment for each of  
6 the offenses. I'll also impose five years of supervised  
7 release with respect to Count 1 and three years of supervised  
8 release with respect to Count 4. And those terms will run  
9 concurrently with one another. Special conditions of the  
10 supervised release --

11 Ms. White, what special conditions did the probation  
12 office recommend?

13 THE PROBATION: We would recommend financial  
14 disclosure.

15 THE COURT: All right. I'll require that there be  
16 financial disclosure to the probation officer. Go ahead.

17 THE PROBATION: All employment be approved by the  
18 probation office.

19 THE COURT: And what?

20 THE PROBATION: All employment be approved.

21 THE COURT: Yes, of course, I'll adopt that as well.  
22 Anything else?

23 THE PROBATION: No, Your Honor.

24 THE COURT: Anything further, any other conditions  
25 of supervised release, Mr. Gibbs?

1 MR. GIBBS: Your Honor, will he be allowed to travel  
2 abroad during the five years of supervised release? We would  
3 ask that he not.

4 THE COURT: Well, I'll cross that bridge when I come  
5 to it. We'll see. For example, I approve and disapprove  
6 international travel all the time for defendants. If Mr. --  
7 let's say, hypothetically, Mr. Mallory is released from  
8 prison, after serving his sentence, and two weeks after he's  
9 released he wants to go to the People's Republic of China,  
10 assuming it still exists, then I'm not likely to be  
11 sympathetic, but if he serves a good part of his supervised  
12 release without any violations, and he has a good reason for  
13 going to China or Costa Rica or wherever he wants to go, yes,  
14 I approve those.

15 MR. GIBBS: Understood. Thank you, Judge.

16 THE COURT: He does have, I think, I know he has  
17 in-laws in China, I assume. Is that correct?

18 MR. KAMENS: In Taiwan, Your Honor. The Republic of  
19 China. There may be extended family in China.

20 THE COURT: Yes, so I'm not going to decide that  
21 now. I'll cross that bridge when I come to it, Mr. Gibbs.  
22 We'll see.

23 Anything further in this matter today?

24 Mr. Mallory, you have an absolute right to appeal  
25 your sentence and your conviction to the Court of Appeals for

1 the Fourth Circuit. You have ten days from today in which to  
2 do it or you may ask me to note your appeal now. You may do  
3 as you wish.

4 Mr. Kamens?

5 MR. KAMENS: Your Honor, we will note the appeal  
6 formally in writing within 14 days.

7 THE COURT: All right. 14. Thank you, Mr. Kamens.

8 All right. Anything further in this matter today,  
9 Mr. Gibbs?

10 MR. GIBBS: Your Honor, we did file a motion for a  
11 preliminary order of forfeiture which the defense did not  
12 object to so if I could hand that up. I don't believe that's  
13 been entered.

14 THE COURT: Yes, you may. This relates to the  
15 CovCom device?

16 MR. GIBBS: It's the CovCom device and the \$25,000.

17 THE COURT: Yes, you-all -- some of you, maybe both  
18 of you, refer to it as a CovCom device. I always thought it  
19 was a covert communications device. Am I right?

20 MR. GIBBS: It does -- it's an abbreviation for  
21 covert communications device.

22 THE COURT: CovCom.

23 MR. GIBBS: I'm not sure how it's pronounced. I'll  
24 go with CovCom. That sounds good.

25 THE COURT: All right.

1 MR. KAMENS: Can I ask the Court's indulgence for  
2 one moment?

3 THE COURT: Yes, you may.

4 (Discussion off the record.)

5 THE COURT: Have I omitted anything, Ms. White, from  
6 the sentence?

7 THE PROBATION: No, Your Honor.

8 MR. KAMENS: I'm sorry, Your Honor.

9 THE COURT: I asked Ms. White, the probation  
10 officer, have I omitted anything? And she confirmed that I  
11 had not.

12 Let me ask once again. Mr. Gibbs, have I omitted  
13 anything from this sentencing proceeding? That is, have I  
14 addressed all the issues and made all the rulings necessary?

15 MR. GIBBS: You have, Your Honor. Thank you.

16 THE COURT: All right. And I have now entered the  
17 unopposed, I think that's the right way to put it, Mr. Kamens,  
18 unopposed forfeiture order.

19 MR. KAMENS: Thank you, Your Honor.

20 THE COURT: Anything else?

21 MR. KAMENS: There's one last thing, Your Honor. If  
22 I --

23 THE COURT: Oh, the designation.

24 MR. KAMENS: Well, we did ask for a designation as  
25 close as possible to Salt Lake City.

1           Also that Mr. Mallory is able to speak Chinese to  
2 his wife. Her primary first language is Chinese.

3           MR. GIBBS: Your Honor, if I may, the -- the special  
4 administrative measures that are on now, I think that is a  
5 restriction within the SAMs that the communications on the  
6 phone have to be in English so he would violate that if he  
7 were to speak in Chinese.

8           THE COURT: So what's your view, Mr. Gibbs?

9           MR. GIBBS: We would object to that. He should  
10 comply with the SAMs. He's been provided with a copy. He's  
11 required to speak in English on there.

12           THE COURT: Well, what would you say to it, Mr.  
13 Gibbs, if she couldn't speak English?

14           MR. GIBBS: Your Honor, we played the recording in  
15 court where they were on the phone together and she --

16           THE COURT: She did speak English. I recall that.

17           MR. GIBBS: She did, Your Honor.

18           MR. KAMENS: She does. It's not her first language.  
19 All of these recordings, all of these calls, are recorded, and  
20 so given that this case is concluded, it makes it much easier  
21 for them to communicate. And the Government is not at all  
22 prevented from reviewing any communication that they would  
23 like.

24           THE COURT: All right. Let me come back to that.  
25 When you say "it's not her first language," Mr. Kamens,

1 English isn't my first language. But, of course, you can tell  
2 that from my speech.

3 MR. KAMENS: I could not.

4 THE COURT: Mr. Gibbs, why do we need to have this  
5 restriction continue?

6 MR. GIBBS: Well, there's a couple of reasons. One  
7 is that it's just difficult for BOP to --

8 THE COURT: He's not going to be a very effective  
9 agent for the People's Republic of China as he's incarcerated.  
10 And if his wife is you can prosecute her.

11 MR. GIBBS: Right. But that's obviously the truth.  
12 The concern is there's always a lag time if the -- if the  
13 recorded conversation is in a foreign language, in terms of  
14 monitoring, because they would have to take a Chinese  
15 conversation, translate it, determine if anything  
16 inappropriate had been said, and in that amount of time some  
17 damage could be done. So that is the concern.

18 And I believe that -- and I have to go back and  
19 look. It's been a while so I have to look at these  
20 particular --

21 THE COURT: Well, let's do this, I think the request  
22 you make, Mr. Kamens, is not unreasonable but I want to think  
23 about it.

24 MR. KAMENS: Understood.

25 THE COURT: Do you know of any authority on the

1 issue? I don't. And I'll doubt you'll find any, but if you  
2 do let me see it within a week and you may do the same within  
3 a week. And then I'll issue an order on that.

4 MR. KAMENS: Thank you, Your Honor.

5 THE COURT: At the moment, Mr. Gibbs, I just don't  
6 see how it's a big problem. Yes, he could probably say  
7 things. Maybe you're reminding me about the -- what was it  
8 that was in the closet that he wanted to get rid of?

9 MR. GIBBS: The SD card, Your Honor.

10 THE COURT: And what did that have on it?

11 MR. GIBBS: It had all eight of the classified  
12 documents that we presented at trial.

13 THE COURT: Including ones at top secret.

14 MR. GIBBS: Correct. And the PowerPoint.

15 THE COURT: And so you would argue, I suppose, who  
16 knows what else he has hidden.

17 MR. GIBBS: That's correct, Judge.

18 THE COURT: Tell her to get rid of it. Well, you  
19 might be right.

20 On the other hand, I'll bet you that if he says that  
21 in Mandarin, it isn't going to be in plain language Mandarin.  
22 It will be like steganography. It would be hidden in there  
23 somewhere. It's going to take you a while to find anyway.

24 Well, let me hear from you in a week. I'll rule on  
25 it promptly. At the moment, Mr. Gibbs, I don't see a strong

1 reason for precluding this. He's subject now to a long period  
2 of confinement. It's got to be difficult for his wife and  
3 children. Although I think, at least one of this children,  
4 they speak Mandarin too.

5 MR. KAMENS: They may. But there's no objection to  
6 the children speaking in English. It's just to facilitate  
7 communication with his wife.

8 THE COURT: Yes, and I'm, at the moment, a bit  
9 sympathetic to your request, but we'll see after I see what  
10 you send me.

11 What else, Mr. Kamens?

12 MR. KAMENS: That's it, Your Honor.

13 THE COURT: All right. I thank counsel for your  
14 cooperation in this case. And wish you good luck, Mr.  
15 Mallory.

16 MR. KAMENS: Thank you, Your Honor.

17 THE COURT: Court stands in recess.

18 And, Ms. White, you will file -- please file a  
19 presentence report that comports with the rulings that I made.

20 THE PROBATION: Yes, Your Honor.

21 THE COURT: Thank you very much for all your help.

22 Court stands in recess.

23  
24 **(Proceedings adjourned at 3:04 p.m.)**  
25



CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Sentencing in the case of the **UNITED STATES OF AMERICA versus KEVIN PATRICK MALLORY**, Criminal Action No. 1:17-CR-154, in said court on the 17th day of May, 2019.

I further certify that the foregoing 57 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this July 30, 2019.



---

Tonia M. Harris, RPR  
Official Court Reporter